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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 510

PHILIP STEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

PHILIP STEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

This Petitioner, Philip Stein, respectfully submits his Petition for Writ of Certiorari and prays that a Writ of Certiorari issue to review the judgment of the United States

Court of Appeals for the Fifth Circuit in the above entitled cause, said opinion and judgment being rendered and dated July 6th, 1966.

CITATIONS AND REFERENCES TO OPINIONS AND PROCEDURE BELOW

The Petitioner was found guilty of Count II (R. 3) of a two count indictment on June 3, 1965 in the United States District Court for the Northern District of Texas. (R. 261). A motion in arrest of judgment was timely filed on June 7, 1965. (R. 328-332). A motion for new trial was timely filed on June 7, 1965. (R. 327-328). The District Court denied the motion in arrest of judgment as well as the motion for new trial. Notice of appeal was timely filed on June 16, 1965. (R. 333-334). The opinion of the Court of Appeals for the Fifth Circuit affirming the conviction of the lower court was dated July 6, 1966, printed in Appendix A hereto, *infra*, pp. 9-17 and is reported in ..... F. 2d ..... . Petition for re-hearing was timely filed by appellant and is printed in Appendix B hereto, *infra*, pp. 19-24. Petition for re-hearing was denied on August 2, 1966 and the opinion of the Court of Appeals for the Fifth Circuit is printed in Appendix C hereto, *infra*, pp. 25-26.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1966, (R. 344) with the Court's opinion (R. 336); Appendix A, *infra*, pp. 9-17. Re-hearing was denied on August 2, 1966, (R. 350); Appendix C, *infra*, pp. 25-26. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Count II of the indictment in question and of which Petitioner was found guilty was legally sufficient to charge an offense against the Petitioner under 18 U.S.C. §1001 and so as to accord the Petitioner his constitutional rights under amendment 6 wherein he is guaranteed the right to be informed of the nature and cause of the accusation so he may prepare his denfense, if any he has thereto.

STATUTE, RULE AND CONSTITUTIONAL AMENDMENT INVOLVED

The statutory provision involved is 18 U.S.C. §1001. The statutory provision is printed in Appendix D, *infra*, p. 27. The federal rule of criminal procedure involved is Rule 7(c) and said rule is printed in Appendix E, *infra*, p. 29. The constitutional amendment involved is Amendment VI and said constitutional amendment is printed in Appendix F, *infra*, p. 31.

STATEMENT

On October 9, 1964 a Two Count indictment was filed wherein the grand jury accused Philip Stein with a violation of 18 U.S.C. §1621 and a violation of 18 U.S.C. §1001. On June 1, 1965, Philip Stein announced ready for trial and entered his plea of not guilty to both counts of the indictment. Upon the completion of the trial, the liberation and consideration by the jury, verdict was returned on June 3, 1965. The jury found that Philip Stein was not guilty of a

violation of 18 U.S.C. §1621 as charged in Count 1, but found him "Guilty" as charged in Count 2 of the indictment.

Philip Stein's procedurally correct motion in arrest of judgment and motion for new trial were each denied by the court. Philip Stein was sentenced to a term of two years with no fine. Subsequently Philip Stein appealed to the Court of Appeals for the Fifth Circuit. After due hearing, the Court of Appeals affirmed the judgment and conviction of the lower court, (Appendix A, *infra*, pp. 9-17). Petitioner then filed a motion for re-hearing in due time which was denied August 2, 1966, (Appendix C, *infra*, pp. 25-26), from which Petitioner files this petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is in direct conflict with Amendment VI of the United States Constitution, Appendix C, *infra*, p. 31.

Amendment VI of the United States Constitution safeguards to the accused the right to be informed of the nature and cause of the accusation made against him by the Government's Indictment so that he may prepare his defense, if any he has, for time of trial. Count II of the Indictment of the case at bar is so drafted and so presented to the jury that regardless of whether or not the defense of the accused had been believed by the jury, they were compelled to find him guilty under the terms of the charge for the reason that a material element of the offense was not alleged, i.e., the

representation by the accused that the entries on the matchbook folders in question were put on those matchbook folders on those particular dates.

The decision of the court below in the instant case is in direct conflict with those decisions rendered by this Court as well as the First and Second Circuit which stated that an indictment even though drawn in the "substantial language of the statue" can only be sufficient if it distinctly advises the Defendant of what he is to meet at the trial, and that it is only sufficient so long as the Constitutional right of the accused is so protected and each and every essential ingredient of an offense is alleged so as to allow the accused to prepare his denfense. *Armour Packing Company v. United States,* (1908) 209 U.S. 56; *Enrique Rivera v. United States,* 57 F. 2d 816 (C.A. 1, 1932); *Brenner v. United States,* 287, F. 636 (C.A. 2, 1922); *Huff v. United States,* 301 F. 2d 760 (C.A. 5, 1962) cert. den. 371 U.S. 938; *United States v. Britton,* (1882) 107 U.S. 655, 2 S. Ct. 512, 27 L. Ed. 520; *Rosen v. United States,* (1895) 161 U.S. 29, 16 S. Ct. 434, 40 L. Ed. 606; *Ledbetter v. United States,* (1898) 170 U.S. 606, 18 S. Ct. 774, 42 L. Ed. 1162; *White v. United States,* 67 F. 2d 71 (C.A. 10, 1933). The instant case does not provide this constitutional right to the accused.

2. The question presented is of importance in the future administration and charging under 18 U.S.C. §1001, Appendix D, *infra,* p. 27. The indictment in the instant case which was the subject of the decision in the court below presents a new and completely different concept of "false documents". There is no other reported case for conviction

or accuittal under this statute where the falsity of the document is developed outside of the document itself. In other words, in the instant case the documents submitted into evidence were in themselves not false. The entry on the documents were not claimed to be false. The concept of "false documents" in the instant case was developed out of some type of purported representation made orally or in some way by the accused at the time he submitted the documents in question into evidence in the Tax Court of the United States. Although the falsity of the documents is wholly dependent upon whether or not the accused made such representations at the time he submitted the documents into evidence Count II of such Indictment does not in any way allege such representation, but merely alleges that the entries of dates shown on the matchbook covers were not placed thereon on those particular dates. The Indictment fails to allege whether or not the accused represented to the Tax Court of the United States of America that those dates were placed thereon at such time. The documents in themselves did not call for any dates to be entered and certainly did not call for a date of original entry. By failing to allege such representation by the accused the Government proceeded to conviction of the accused wihout regard to whether or not such representation was made. The accused's defense could be of no avail against the language of the indictment. The defense did not controvert any alleged fact because the Government had failed to allege the most essential ingredient of the offense although they had alleged an offense in the "substantial language of the statute." No other reported case carries this new distinguishing characteristic of "false documents".

The decision of the court below in the instant case is in direct conflict with the constitution principal illustrated and developed in *Fontana v. United States*, 262 F. 283 (C.P.A. 8, 1919).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HENRY KLEPAK,
ROY J. TRUE,

CERTIFICATE OF SERVICE

I hereby certify that I have delivered to the attorney of record for the Respondent a copy of this Petition for Writ of Certiorari on the .... day of August, 1966.

APPENDIX A

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 22770

PHILIP STEIN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

(July 6, 1966.)

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and CHOATE, Senior District Judge.

CHOATE, Senior District Judge: Appellant was convicted in the district court for making and submitting false documents to the Tax Court in violation of 18 U.S.C. §1001, which provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States know-

> ingly and willfully falsifies, conceals or cover up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representation, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more that $10,000 or imprisoned not more than five years or both. June 25, 1948, c. 645, 62 Stat. 749."

At the same time the jury acquitted appellant of perjury. Both charges grew out of proceedings in the Tax Court, wherein appellant had sought review of the disallowance by the Commissioner of Internal Revenue of certain gambling losses during the years 1952-54. In the Tax Court appellant testified that his practice was at the end of each gambling day to note his winnings or losses on match book covers, cocktail napkins, cards, etc., and later to transfer the data to his notebook, which he used to make out his tax return. Appellant introduced into evidence in the Tax Court Exhibit 12, a shoebox containing match book covers, etc., with notations of amounts won and lost on specific dates in 1952.

Appellant's testimony as to how he noted and recorded his gambling winnings and losses, as a "contemporaneous record," was the basis for Count One charging him with perjury (18 U.S.C. §1621); the introduction of Exhibit 12 into evidence was the basis for Count Two charging him with making and submitting false documents to the Tax Court (18 U.S.C. §1001).

At trial below appellant admitted that the notations on the items comprising Exhibt 12 were not in existence in 1952. He contends that he used them in the Tax Court, not as originals contemporaneously made, but as "examples"

of how he kept records. Thus, he argues, he can be convicted under the wording of the second count without having committed a crime.[1] Appellant's contentions on appeal, in the order in which they will be discussed, center on: the sufficiency of the indictment; the alleged inconsistency of the verdict of not guilty on Count One and guilty on Count Two; the sufficiency of the evidence as to the false document offense.

1. Count Two of the idictment was not fatally defective. It is sufficient in setting forth the elements of the offense (Mathes, "Jury Instructions & Forms for Federal Cases," 27 F.R.D. 39, 136) and in apprising the person charged of what he must be prepared to meet. See *United States v. Debrow*, 346 U.S. 374 (1953). The essential element of falseness is charged by the allegation that the notations on the match book covers "were not made on the dates shown." This was enough to apprise appellant that he was charged

[1] Count Two states:

"On or about the 16th day of November 1960, at Dallas, Texas, within the Dallas Division of the Northern District of Texas, one Philip Stein, late of Dallas, Texas, did then and there knowingly and willfully make and submit false documents to the Tax Court of the United States, an agency of the United States, in a matter within its jurisdiction, while it was conducting a hearing at Dallas, Texas into his and his wife's income tax liabilities for the years 1952, 1953 and 1954, by introducing into evidence Petitioner's Exhibit Number 12, which was a shoebox of match book covers, cocktail napkins, post cards and other pieces of paper which had recorded thereon dates in 1952 and amounts of gambling wins and losses, whereas as he then and there well knew that the notations on said match book covers in this box with the dates of Jan. 17-52, Feb. 5-52, April 28-52, May 3-52, May 7-52, May 10-52, May 15-52, May 21-52, May 29-52, Sept. 25-52, Sept. 26-52, Sept. 29-52, Oct. 1-52, Oct. 6-52, Nov. 11-52, Nov. 15-52, and Dec. 20-52 were not made on the dates shown, and that said false and fictitious documents were material and relevant to the hearing being conducted by the Tax Court of the United States into his and his wife's income tax liabilities for the years 1952, 1953 and 1954."

with holding out these notations as having been made on the dates shown on the items when in fact they were not made then.

2. The verdict of acquittal on the perjury count is no basis for setting aside the conviction on the false documents count. The verdict is not necessarily inconsistent, since different crimes, with different elements and burdens of proof were charged. In addition, on the perjury charge the Government must prove the falsity of the testimony by at least two witnesses or by one witness and corroborating evidence, whereas this burden is not on the Government in connection with the false documents charge. See *Neely v. United States*, 300 F. 2d 67 (9th Cir.), *cert. denied*, 369 U.S. 864 (1962). More important, actual or apparent inconsistency in a jury verdict in a criminal case is no basis for setting it aside. In *United States v. Dunn*, 284 U.S. 390 (1932), defendant was convicted of maintaining a nuisance by keeping liquor for sale, but was acquitted of possessing and selling liquor at the same time and place. The conviction was sustained. See also *Steckler v. United States*, 7 F. 2d 59 (2d Cir. 1925) and 8 Moore, Federal Practice ¶ 31.05 (2d ed. 1965).

3. The evidence was sufficient to sustain the guilty verdict as to the false documents offense. Appellant had testified in the Tax Court that he "found" the items while "going through the garage, cleaning it up the other day"; that he had thrown out the slips for other years. When asked, "Was it from these [items of Exhibit 12] you then made your entry into the books [for 1952]?," appellant replied, "I did." The jury could properly conclude that the documents had

been introduced into evidence upon the false representation that appellant made the notes thereon on the dates shown on the items—that appellant was guilty as one who knowingly and willfully falsifies, conceals or covers up . . . a material fact, . . . or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry" as prohibited by the statute.

An additional issue, raised by the court sua sponte and briefed by both parties at the court's request, is whether the Tax Court is a department or agency of the United States within the contemplation of 18 U.S.C. §1001. The question has not been judicially determined; however, the definitions provided in 18 U.S.C. §6, considered in conjunction with the status and nature of the Tax Court, require an affirmative answer.

As used in Title 18, "department and agency" are defined by section 6.

> "The term 'department' means one of the executive departments enumerated in section 1 of Title 5, unless The context shows that such terms was intended to describe the executive, legislative, or judicial branches of the government.
>
> "The term 'agency' included any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such item was intended to be used in a more limited sense."

The Board of Tax Appeals, predecessor of the Tax Court, was created by Congress in 1924 (Revenue Act of 1924,

ch. 234, §900, 43 Stat. 253, 336, as amended by Revenue Act of 1926, ch. 27, §1000, 44 Stat. 105) to give taxpayers, prior to payment of the taxes, an opportunity for independent review of the Commissioner's determination that additional taxes are due. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 721 (1929); *Flora v. United States*, 362 U.S. 145 (1960) (on rehearing). The Board was not a court. It was an executive or administrative board, upon the decision of which the parties could seek review by the courts, similar to the judicial review of orders of the Federal Trade Commission.[3] *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 723, 725, (1929). *Accord, Helvering v. Rankin*, 295 U.S. 123, 131, (1935); *Commissioner v. Liberty Bank & Trust Co.*, 59 F. 2d 320, 323 (6th Cir. 1932); *Tracy v. Commissioner*, 53 F. 2d 575, 578 (6th Cir. 1931), *cert. denied*, 287 U.S. 632 (1932) ("The mere fact that the Board may exercise judicial, or quasi judicial powers . . . does not militate against this position. In organization and function the Board is administrative"); *Garden City Feeder Co. v. Commissioner*, 75 F. 2d 804, 806 (8th Cir. 1935).

The nature of the Board of Tax Appeals as an independent agency in the executive branch of the government was continued by the Internal Revenue Code of 1939, §1100. "Its name was changed to the Tax Court of the United States by the Act of Oct. 21, 1942, 56 Stat. 957, but its relation to the constitutional courts was not altered." *Hutchings-Sealy Nat'l Bank v. Commissioner*, 141 F. 2d 422, 424 (5th Cir. 1944).

[3] The Tax Court has also been compared to "such agencies as the National Labor Relations Board." *Nash Miami Motors, Inc. v. Commissioner*, 358 F. 2d 636, 638 (5th Cir. 1966).

Presently, Section 7441 of the Internal Revenue Code of 1954 provides:

> "The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court."

By statute and case law the characterization of the Tax Court as an "agency" or "administrative body" has been maintained. See *Martin v. Commissioner*, 358 F. 2d 63 (7th Cir. 1966) and *Nash Miami Motors, Inc. v. Commissioner*, 358 F. 2d 636 (5th Cir. 1966) (where the constitutionality of the Tax Court was attacked and upheld).[1] Compare *Stern v. Commissioner*, 215 F. 2d 701 (3rd Cir. 1954) and *Quinn v. Hook*, 231 F. Supp. 718 (E.D. Pa. 1964), aff'd 341 F. 2d 920 (3rd Cir. 1965) (emphasizing the judicial functions of the Tax Court). The Tax Court is a creature of Congressional enactment whose powers are granted by Congress. It is an agency of the United States by designation and in fact, and therefore it is an agency within the contemplation of 18 U.S.C. §1001.

We cannot accept appellant's suggestion that section 1001 was designed to apply only to falsifications made *by* a governmental employee. The force and effect of the statute is to

[1] On petition for rehearing, the court in *Nash Miami Motors, Inc. v. Commissioner*, 358 F. 2d at 639, rejected the contention that *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), overruled Ex parte *Bakelite Corp.*, 279 U.S. 438 (1929), on the point for which *Bakelite* was cited in the *Nash* opinion—that functions such as those performed by the Tax Court can constitutionally be entrusted by Congress to a legislative court or executive officers.

prevent frauds *upon* the Government. *Spivey v. United States*, 109 F. 2d 181, 184 (5th Cir. 1940).

Since no reversible error has been shown on the grounds urged by appellant and since the Tax Court is a "department or agency of the United States" within the purview of 18 U.S.C. §1001, the judgment of the conviction in the district court is AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1965

No. 22770

D. C. Docket No. 3-367-Criminal Action

PHILIP STEIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and CHOATE, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 6, 1966

Issued as Mandate:

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 22770

PHILIP STEIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

APPELLANT'S MOTION FOR REHEARING

HENRY KLEPAK,
ROY J. TRUE,
15th Floor,
Mercantile Bank Bldg.,
Dallas, Texas.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 22770

PHILIP STEIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

APPELLANT'S MOTION FOR REHEARING

STATEMENT OF THE CASE

This Motion for Rehearing is presented to the Court pursuant to Rule 29 of the Rules for the United States Court of Appeals for the Fifth Circuit, and pursuant to the authority granted therein.

On July 6 1966, the decision and opinion of this Honorable Court was filed of record setting forth an opinion written by Honorable Judge Choate, a Senior District Judge sitting on the Court of Appeals for the oral argument and con-

sideration of this case. The decision of the Court as set forth in said opinion was that the District Court from which this case was appealed was affirmed on the basis that no reversible error had been shown by the Appellant on its appeal.

This Motion for Rehearing is presented in good faith, and not for the purpose of delay. It is the purpose of this Motion for Rehearing to direct the Court's attention to the meritorious ground as set out hereinafter.

GROUND FOR REHEARING

The opinion of July 6, 1966, authored by Judge Choate on its face appears to deal individually with every point of error raised by the Appellant in its brief on appeal. However, the Court failed to comment or deal with the question raised in Appellant's Brief and in its Point of Error Number One therein, wherein the Court's attention was directed to the question, "How could the Defendant's defense, as it was posed, prevail, even if believed by the Jury?" Appellant's Brief, page 13. On the cited page of Appellant's Brief, namely, page thirteen, there begins an argument under Point of Error Number One directed at the Jury's limited consideration of Count II of the Indictment as it was drawn. Presuming that the Court's opinion under its first numbered paragraph was clear and that the Appellant should have been apprised of the charge against him as being that he represented the matchbook covers carried dates of original entry, it still does not answer the question quoted above, and raised by Appellant's Brief.

Even should we presume that the Appellant realized what he was being charged with is substance (the fact of representation) how could his defense meet the "imputed" allegations of the Government? The Government had the secure position, by way of Count II of the Indictment, of not having to *prove* such representation by the Appellant in order for the Jury to find the Appellant guilty of the allegations of Count II. This is the most important and salient point raised by the Appellant's Brief. It is not enough to merely pass off Count II with a statement that the Appellant should have realized the substance of the charge. It was the tryers of the fact who sat on the jury and who were restricted by the charge of the Court and by law from presuming anything other than that which is presented to them. Count II of the Indictment as presented to them *absolved* the need of the Government proving up its concept of falseness which was the most essential element of the offense purportedly charged therein. The Jury was compelled to find the Appellant guilty under Count II as it read without regard to his representation or lack of representation. This is in derogation of the Appellant's constitutional rights and protection.

Because the Court did not comment on this aspect of the deficiency of Count II as it was drafted and under which the Appellant was found guilty, this Motion for Rehearing is urged by the Appellant. Pages thirteen (13) through seventeen (17) of Appellant's Brief submitted on appeal are specifically referred to by the Appellant on this Motion for Rehearing as being in support of this Motion for Rehearing.

CONCLUSION

WHEREFORE, Appellant respectfully prays that The Motion for Rehearing contained herein be granted and that the conviction be reversed as to Count II of the Indictment.

Respectfully submitted,

HENRY KLEPAK,
ROY J. TRUE,

By: .....

CERTIFICATE OF COUNSEL

Pursuant to Rule 29 of the United States Court of Appeals for the Fifth Circuit, Counsel for the Appellant, Roy J. True, does hereby state and certify as officer of the Court that the foregoing Motion for Rehearing is urged in good faith and presented for purposes of justice and not for the purpose of delay.

By: .....

CERTIFICATE OF SERVICE

Counsel for Appellant hereby certifies that the Attorney of Record for the Appellee has been served with a copy of this Motion for Rehearing on the ... day of July, 1966.

By: .....

APPENDIX C

U. S. COURT OF APPEALS
F I L E D
AUGUST 2, 1966
EDWARD W. WADSWORTH
CLERK

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 22770

PHILIP STEIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
(August 2, 1966).

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and CHOATE, Senior District Judge.

PER CURIAM:

This cause was considered upon appellant's motion for rehearing. It presents no issues which were not considered previously by the court, and covered in points one and three of the opinion.

Under clear instructions from the trial court, the jury could have acquitted appellant had it believed his defense—that the exhibits he introduced into evidence in the Tax Court were intended as mere "examples." The propriety of the instructions has not been questioned in this cause. The verdict of guilty has not been shown to be derived through any misconception of the language of the indictment.

The motion for rehearing is therefore DENIED.

/s/ EVERETT W. CHOATE
Senior U. S. Dist. Jdg.

APPENDIX D

Title 18, United States Code Annotated

§1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

APPENDIX E

Federal Rules of Criminal Procedure

Rule 7. The Indictment and the Information

* * *

(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

APPENDIX F

Constitution of the United States

Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been omitted, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 510

PHILIP STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, after a jury trial, was convicted (R. 326),[1] on the second count of an indictment (R. 3–4) charging a violation of 18 U.S.C. 1001,[2] *viz.*, that he "did then and there knowingly and willfully make and submit false documents to the Tax Court of the

[1] "R." references are to be mimeographed record in the court of appeals.

[2] This section provides as follows:

"Who ever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

234-380—66

United States * * * by introducing into evidence * * * match book covers * * * which had recorded thereon dates in 1952 and amounts of gambling wins and losses, whereas * * * the notations [bearing certain specified dates] * * * were not made on the dates shown" (R. 3). The court of appeals affirmed (Pet. 17).

This indictment grew out of prior Tax Court proceedings. The Commissioner had disallowed certain gambling losses allegedly suffered by petitioner in 1952–1954. In an effort to substantiate these losses, petitioner testified in the Tax Court that it was his practice at the end of each gambling day to note his winnings or losses on a match book cover, cocktail napkin, etc., and later transcribe the information to his notebook (introduced into evidence as Exhibit 10), which he used to prepare his tax return. Petitioner produced a shoebox containing match book covers, etc. (admitted as Exhibit 12), with notations on each of amounts won and lost on specified dates in 1952. (Pet. 10.) The relevant portion of petitioner's Tax Court testimony with regard to the match book covers, etc., is set forth in the appendix, *infra*, pp. 6–8.

The instant indictment charged petitioner with perjury (count one), based upon his above-described oral testimony in the Tax Court, and with submitting false documents (count two), based upon the above described match book covers, etc., introduced into evidence in the Tax Court (R. 1–4, 36, 41). At trial petitioner admitted that the notations on the match book

covers, etc., had not been in existence in 1952 (R. 144–146). The jury convicted petitioner on the false documents count and acquitted on the perjury count.

Petitioner now contends that count two of the indictment failed to inform him of the nature of the accusation and permitted conviction even if the jury believed his defense that he never represented to the Tax Court that the match book notations were contemporaneous records. Neither contention has merit.

Count two clearly informed petitioner of the charge he must be prepared to meet. As the court of appeals observed (Pet. 11–12):

> The essential element of falseness is charged by the allegation that the notations on the match book covers "were not made on the dates shown." This was enough to apprise appellant that he was charged with holding out these notations as having been made on the dates shown on the items when in fact they were not made then.

Furthermore, it is obvious that petitioner's contention is a mere afterthought, since he never requested a bill of particulars as he would have been entitled to do if he had actually been in doubt as to the nature of the charge against him. Fed. Rules of Crim. Proc. 7(f). Moreover, it is clear from the record that petitioner was not taken by surprise. Petitioner's testimony in the prior Tax Court case with regard to the match book covers (see Appendix, *infra*, pp. 6–8) was read to the jury in this case and petitioner's counsel questioned him extensively on what he had meant by that testimony. In response to these ques-

tions petitioner testified that he had never intended to represent to the Tax Court that the entries on the match book covers, etc., were original entries or contemporaneous records. (R. 135–206.) Petitioner's real complaint is that the jury did not believe his defense.

Nor is there merit to petitioner's contention that the indictment failed to allege that he had misrepresented the nature of the entries on the match book covers and thus that the jury was not permitted to acquit him even if it believed his defense. For if petitioner had never represented to the Tax Court that the documents here in question were original or contemporaneous records, but had offered them merely as recently prepared examples of the way in which he kept records of his gambling wins and losses, then they would not have been "false documents" as alleged in count two. Moreover, if there had at the time of the trial been any doubt as to whether petitioner's defense, if believed by the jury, would have required acquittal, he could have requested such an instruction to the jury. But the record indicates that he made no objection to the court's charge (R. 308–326). The entire conduct of the trial—including petitioner's extensive testimony in the district court as to what he had meant by his Tax Court testimony (R. 135–206)—demonstrates that all parties understood that this issue was relevant in determining whether the documents were "false."

Since petitioner's contentions are without merit and there is no conflict of decisions, the petition should be denied.

Respectfully submitted.

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OCTOBER 1966.

APPENDIX

In relevant part, petitioner's testimony to the Tax Court regarding this shoebox of match book covers, etc., was as follows (R. 34–43):

Q. [Direct examination by defendant's counsel, Mr. Klepak] * * * you had been requested by the Internal Revenue Department to find whatever you could in reference to these so-called match folders and cocktail napkins and other things, score cards, and things as to your records, were you able to find them?

A. They never did ask me, but when I was going through the garage, cleaning it up the other day, I found those.

Q. Now, actually what I have in my hand, what do they represent?

A. My losings and winnings for the year 1952.

* * * * *

Q. How is it you found this stack?

A. They were just put away in there. The others were thrown away. I didn't ever put—I would have throwed those away if I had known what they were.

Q. I see. Was it from these you then made your entry into the books?

A. I did.

* * * * *

Q. I will ask you, if you will, will you identify the various items in this box and tell the Court what they are and how you kept records and whether—how you then transposed them into the books that you have?

A. Well, they are from different tourist courts——

The COURT: Well, just a minute. If you intend to offer this in evidence, you are going to have to mark these for identification.

* * * * *

Mr. KLEPAK: If it please the Court, I am just wondering—I imagine there would be over a hundred and some odd—they are all matchbox folders, score cards, cocktail napkins from all over the United States.

The COURT: Mark the box and its contents as one exhibit.

The CLERK: Exhibit 12 for identification.

* * * * *

The COURT: How did you use those records in the shoebox to keep your other records?

The WITNESS: Well, at the end of the year, when I got ready to make my return out, I copied those out of there, I sorted those out day for day and wrote them in the little notebook.

* * * * *

Q. Have you since you found these, have you checked these against what was entered in those books, in Exhibit No. 10?

A. Yes, sir.

Q. Did you find every one of the match folders with the dates on them showing the amount won or lost that corresponded with Exhibit No. 10?

A. I did.

Q. Now, if it please the Court, we will just spot check some of them. Will you take some of them out and explain what cities, how you wrote it on the match folder?

A. This is in Fort Worth November 11, 1952, won $486.

Q. In other words, you wrote the date, you put "W" and you wrote the amount?

A. Yes, sir.

* * * * *

Q. Getting to these little slips, how many cities in the United States, how many do these represent?

A. Several.

Q. Several, you say several; how many do these represent?

A. Twenty, thirty.

The COURT: Well, the exhibit will show for itself.

* * * * *

Q. I will ask you, then, at the time that you made the entries into these books, first in the little instruments that you referred to, match folders, were those correct at that time when you made those entries?

A. That's right.

* * * * *

Q. And then when you put them into the books, were those correctly taken from the other instruments?

A. That's right.

Q. And did you base it then on your actual record, or did you base it on memory?

A. On the records.

By Mr. MILLS:

Q. You testified that these slips—It is now your testimony these slips were true and correct? correct?

A. Yes, sir.

* * * * *

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OCTOBER TERM, 1966

No. 510

PHILIP STEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM IN REPLY TO OPPOSITION OF RESPONDENT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The opposition filed by the Respondent, United States of America, states that Petitioner's contentions are without merit, and briefly sets forth its statements which purportedly support that conclusion. In reading and studying the opposition filed by the Respondent it is apparent that

its statements are in error and this error is revealed by the record on file herein.

The Respondent's opposition (Page 4) states that there is no merit "* * * to Petitioner's contention that the indictment failed to allege that he had misrepresented the nature of the entries on the match book covers and thus that the jury was not permitted to acquit him even if it believed his defense." There is unquestionable merit in this contention of this Petitioner, and the merit is shown on the face of the indictment. It is without question that the indictment does not allege that the Petitioner misrepresented the nature of the entries on the matchbook covers. The Respondent takes the position before this Court that the use of the words, "false documents", as alleged in Count II was sufficient to carry the implication and innuendo of *misrepresentation* of the nature of the entries of the match book covers. Case upon case issued out of the Supreme Court of the United States, the various Courts of Appeal of the United States, as well as the Federal District Courts recite the law to be that an indictment (or a count therein) is not sufficient if based on *implication* or *innuendo*. *United States v. Apex Distributing Company, Inc.*, 148 F. Supp. 365 (D.R.I., 1957); *United States v. Minnec*, 104 F. 2d 575 (C.A. 7, 1939) cert. den. 308 U.S. 577; *McClintock v. United States*, 60 F. 2d 839 (C.A. 10, 1932); *Dunn v. United States*, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356.

It cannot be emphasized too much, and it is implored that the Court's attention be directed to the fact, that there is no case parallel or analogous to the case at bar which has

arisen under the statute in question, namely, 18 U.S.C. 1001. In that regard it is pointed out to this Honorable Court that this case is the first case presented for decision and determination of whether or not the government, in alleging a document is false, must allege the nature of its falseness unless the document is in itself false. In the case at bar the documents themselves are not attacked as being false. The falseness of the documents in question arise out of an alleged misrepresentation of the Petitioner at the time they were submitted into evidence before the Tax Court of the United States. It is this misrepresentation which is not alleged in the indictment, whereas the Constitution of the United States of America, Rule 7(c) of the Federal Rules of Criminal Procedure and all case law thereunder requires that every essential element of a crime be charged by the indictment. This essential element of this purported crime was not alleged in the indictment.

It is not to the advantage of the Respondent that no objection to the Court's charge was made by Petitioner. The Rules do not provide that such objection be necessarily taken to preserve error. It is to the advantage of the Petitioner that all proper motions were prepared and filed within the given times, briefs submitted in support thereof and proper error assigned at all points in the progress of this matter. The record is clear as to Petitioner's right to raise his objections as they have been raised herein.

In conclusion and summary Petitioner submits to the Court that the matter herein is a case of first impression for the Courts of the United States of America in that it involves a serious Constitutional question regarding the

rights of parties being charged under indictments brought for violations of 18 U.S.C. Section 1001 and that this case, being a substantial deviation of the Constitutional rights of Defendants charged by indictment which have heretofore been accorded to such individuals by reason of Amendment VI of the Constitution of the United States, Rule 7(c) of the Federal Rules of Criminal Procedure, and seventy-five years of case law arising out of the various Federal Courts, including this Honorable Supreme Court of the United States, is of extreme importance. For the foregoing reasons, and those set forth in the original Petition for Writ of Certiorari on file herein, Writ of Certiorari should be granted and Petitioner respectfully so prays.

Respectfully submitted,

HENRY KLEPAK,
ROY J. TRUE,

By .....

CERTIFICATE OF SERVICE

I hereby certify that I have delivered to the attorneys of record for the Respondent, Thurgood Marshall, Solicitor General, Mitchell Rogovin, Assistant Attorney General, Richard B. Buhrman and John M. Brant, attorneys, Department of Justice, Washington, D. C., and Melvin M. Diggs, United States Attorney, B. H. Timmins, Jr., Assistant United States Attorney, P. O. Box 153, U. S. Post Office and Courthouse, Dallas, Texas, a copy of this Memorandum in Reply to Opposition of Respondent on the ..... day of ....., 1966.

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